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07 UNITED STATES DISTRICT COURT
08 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

09 SAIDAH COAXUM,)
10 Plaintiff,) CASE NO. C10-1815-MAT
11 v.)
12 STATE OF WASHINGTON, et al.,) ORDER RE: PENDING MOTIONS
13 Defendants.) FOR SUMMARY JUDGMENT
14

15 INTRODUCTION

16 Plaintiff Saidah Coaxum proceeds with counsel in this 42 U.S.C. § 1983 civil rights
17 case. She names the State of Washington, the Washington Office of Administrative Hearings
18 (OAH), and state employees Anna Marie Thebo, Joel Roalkvam, and Bea Munoz as
19 defendants. Plaintiff alleges violation of her federal and state constitutional rights in relation
20 to the suspension and revocation of her in-home daycare license and a finding of child abuse.
21 (Dkt. 36.)
22

01 Defendants move for dismissal of plaintiff's claims on summary judgment (Dkt. 41)
02 and plaintiff moves for partial summary judgment, with a request for oral argument (Dkt. 46).
03 Having considered the pending motions and all materials filed in support and in opposition, as
04 well as the remainder of the record, the Court finds oral argument unnecessary and defendants
05 entitled to dismissal of plaintiff's claims on summary judgment.¹

06 BACKGROUND

07 Washington State's Department of Early Learning (DEL) licensed plaintiff Saidah
08 Coaxum to operate an in-home daycare beginning in 1999. (Dkt. 25-1 (DEL Review Decision
09 and Final Order) at 20.) The facts relevant to this case involve daycare provided by plaintiff to
10 a child – "P" – on April 9 and April 10, 2008. (*Id.* at 21.)

11 P's mother, Erika Rivera-Flores, noticed bruises on P's inner thighs while changing her
12 diaper in the afternoon of April 10, 2008. (*Id.*) P's father, Paulino Carmona, came to
13 Rivera-Flores's house and took pictures of the bruises. (*Id.*) P also had an older bruise on her
14 left knee, reported to have resulted from her collision with a piece of household furniture while
15 playing. (*Id.*; Dkt. 54-1 at 37-38.)

16 Rivera-Flores and Carmona returned with P to plaintiff's daycare in the evening of
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18 ¹ Defendants also move to dismiss plaintiff's motion and strike her response to their motion
19 based on plaintiff's failure to include citations to the record. Plaintiff's briefing (*see* Dkts. 46 & 50) is
20 insufficiently supported. *See* Local Civil Rule 10(e)(6) ("[T]he parties shall, insofar as possible, cite
21 the page and line of any part of the transcript or record to which their pleadings, motions or other filings
22 refer.") and Fed. R. Civ. P. 56(c)(1)(A) (requiring citation to particular parts of materials in the record).
However, the Court declines to dismiss plaintiff's motion or strike her response on this basis. Instead,
the deficiency of the briefing affects the Court's consideration of the pending motions. *See, e.g.,*
Carmen v. S.F. Unified Sch. Dist., 237 F.3d 1026, 1031 (9th Cir. 2001) ("The district court need not
examine the entire file for evidence establishing a genuine issue of fact, where the evidence is not set
forth in the opposing papers with adequate references so that it could conveniently be found.")

01 April 10, 2008. (Dkt. 25-1 at 21.) Plaintiff denied the bruises were sustained at her daycare.
02 (*Id.*) After the parents left, plaintiff called her DEL licensor, defendant Thebo, and left a
03 message asking for a return call. (Dkt. 42-5 (Ex. E, Coaxum Dep.) at 8.) Plaintiff and/or her
04 mother also called P's parents three times that evening. (Dkt. 25-1 at 22.) The parties agree
05 that plaintiff and/or her mother communicated that P should not return to the daycare on the
06 following day. (*Id.*; *accord* Dkt. 46 at 4.) Also, plaintiff conceded she told Carmona to make
07 sure he knew what he was doing as reporting to Child Protective Services (CPS) "causes
08 trouble." (Dkt. 42-5 at 9-10.)

09 A friend of Rivera-Flores made a referral to CPS on April 11, 2008. (Dkt. 43-1 (Ex.
10 A).) On that same day, Rivera-Flores and Carmona took P to Swedish Hospital. (Dkt. 25-1 at
11 22.) Swedish Hospital made a referral to CPS, reporting the bruising as black and blue and
12 appearing to have been sustained within the previous forty eight hours. (Dkt. 43-3 (Ex. C) at
13 2.) The examining physician, Dr. Sakata, recommended P not be taken back to plaintiff's
14 daycare. (*Id.* at 3.)

15 The CPS referral on P was referred to the Department of Social and Health Services'
16 (DSHS) Division of License Resources/Child Protective Services (DLR/CPS) for investigation.
17 (Dkt. 43, ¶3.) DLR/CPS faxed the referral to the Seattle Police Department (SPD) for
18 investigation of child abuse, assigned defendant Munoz as the DLR/CPS investigator, and
19 notified DEL a referral of abuse and neglect had been screened in for investigation. (*Id.*, ¶¶3,
20 7). DEL initiated its own investigation, staffed by Thebo and her supervisor, defendant
21 Roalkvam. (Dkt. 44, ¶¶ 2-3, 7-8; Dkt. 45, ¶¶ 3, 5.)

01 The DLR/CPS investigation began with Munoz interviewing Rivera-Flores and
02 Carmona on April 14, 2008. (Dkt. 43, ¶¶4, 7-9.) Munoz observed P's bruising, Dr. Sakata's
03 discharge summary, and the cell phone showing the three calls received from plaintiff, and
04 obtained the medical records from Swedish Hospital. (*Id.*, ¶¶7-10.) Munoz informed
05 plaintiff she would be contacted at a later date. (*Id.*) Pursuant to DSHS policy and protocols,
06 Munoz was not to interview Coaxum given the law enforcement referral. (*Id.*) Munoz
07 proceeded to provide P's medical records, records regarding plaintiff's CPS history, and the
08 photographs taken by P's parents to Dr. Naomi Sugar, a consulting physician board certified in
09 child abuse pediatrics. (*Id.*, ¶11.) Dr. Sugar, in a May 5, 2008 letter, opined that P's bruises
10 were "highly concerning for inappropriate force used in positioning and holding a child for a
11 diaper change." (*Id.*, ¶11 and Ex. B.)

12 The DEL investigation began on April 14, 2008 with Thebo personally serving plaintiff
13 at her home with a summary suspension letter. (Dkt. 44, ¶8 and Exs. A & B.) The letter
14 described the facts leading up to DEL's decision as including the existence of "an active
15 DLR/CPS investigation alleging Negligent Treatment or Maltreatment, or Physical Abuse of a
16 child or children" in plaintiff's care, and described the referral – "(# 1902114)" – as alleging "a
17 child sustained an unexplained injury while in [plaintiff's] care and that [plaintiff] attempted to
18 convince the parent not to report the injury to the licensor." (*Id.*, Ex. A.)² Thebo and
19 Roalkvam attest that, at that time, it was standard practice in the Seattle DEL office to issue a
20 summary suspension when an investigation of child abuse and neglect was screened in for

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22 ² Thebo subsequently issued an amended summary suspension letter dated April 15, 2008 and changing
the prior reference to "Child Care Centers" to "Family Child Care Homes[.]" (Dkt. 44, Exs. A & D.)

01 investigation by DLR/CPS. (*Id.*, ¶7 and Dkt. 45, ¶3.)

02 Thebo asked to come in and plaintiff let Thebo into her home. (Dkt. 44, ¶9 and Dkt.
03 42-5 at 11, 14-15.) In addition to serving the summary suspension letter, Thebo asked plaintiff
04 to start calling the parents of the children in the daycare and gathering information from the
05 children's files. (Dkt. 44, Ex. B.) Thebo attests that she observed plaintiff filling out a
06 Childcare Injury/Incident report form, which plaintiff backdated to April 10, 2008. (*Id.*, ¶10
07 and Ex. C.) Thebo left once all of the children in the home had left. (*Id.*, Ex. C.) Plaintiff
08 did not see Thebo take anything from her home or notice anything missing after Thebo left.
09 (Dkt. 42-5 at 11.)

10 Plaintiff sought a stay of the summary suspension of her daycare license and ALJ
11 Desiree Hosannah held a hearing on May 20 and May 27, 2008. (Dkt. 25-1 at 24.) Witnesses
12 at the hearing included plaintiff, her mother, Aileen Ellis, Flores-Rivera, Carmona, Thebo, and
13 Munoz. (Dkt. 42, Ex. B.) ALJ Hosannah, in a June 27, 2008 decision, denied plaintiff's
14 request for a stay, finding plaintiff's actions "troubling and of great cause for concern[]" and, if
15 proven, to warrant the summary suspension of her license. (*Id.* at 2-3.) The ALJ also found
16 plaintiff's "refusal to properly cooperate and document the events" at issue to present
17 "sufficient concern for the children's safety and welfare[]" and the facts supporting a
18 determination that plaintiff "attempted to coerce the alleged victim's parents to not report their
19 child's injuries." (*Id.* at 3.)

20 On August 29, 2008, DEL revoked plaintiff's license. (Dkt. 43, ¶13; Dkt. 44, ¶5 and
21 Ex. A.) The letter explaining the basis for the decision noted, *inter alia*, plaintiff's failure to

01 properly report P's injuries, the report that she had attempted to persuade and coerce the parents
02 into not reporting the injury, a conclusion that plaintiff gave false testimony at the hearing in
03 stating that she wrote the incident report on April 10, 2008, and plaintiff's recent DEL history.
04 (Dkt. 44, Ex. A.)

05 On October 4, 2008, Munoz received notice that the SPD had concluded its
06 investigation and found insufficient evidence to proceed with criminal charges against plaintiff.
07 (Dkt. 44, ¶14.) The police report stated: "Because of the conflicting statements given by the
08 child's parents as well as by the caregiver[] I cannot determine whom, if anyone caused them."
09 (Dkt. 19-1 at 19.)³ After receiving the police report, Munoz attempted to contact plaintiff by
10 letter and telephone. (Dkt. 43, ¶15.) Plaintiff likewise attempted to speak with Munoz. (*Id.*)
11 Despite the multiple attempts, Munoz and plaintiff did not meet to discuss the investigation.
12 (*See id.*, ¶¶15-16 and Ex. B at 5-6.)

13 On January 28, 2009, Munoz concluded her investigation with a founded finding of
14 child abuse. (*Id.*, ¶17 and Ex. B.) She noted, *inter alia*, plaintiff's failure to document and
15 report the injuries, the report that plaintiff had pleaded with P's parents not to report the
16 bruising, Dr. Sugar's report, an absence of evidence to suggest P's parents caused the bruising,
17 the parent's report that P had expressed fear of going to plaintiff's daycare, and prior reports

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19 3 The SPD report also stated: "Further complicating this issue is Dr. Sugars [sic] letter
20 indicating that while the injuries are suspicious, accidental causes cannot be ruled out." (Dkt. 19-1 at
21 19.) However, as noted in the later DEL and CPS Final Orders, the SPD detective appeared to have
22 misread Dr. Sugar's letter. (Dkt. 24-1 (CPS Review Decision and Final Order) at 23-24 and Dkt. 25-1
at 23-24.) Dr. Sugar's letter, in an appendix portion, referenced two prior reports made in regard to
plaintiff's daycare, the latter of which resulted in a conclusion that a child's fractured finger was likely
to have been accidental. (Dkt. 43, Ex. B at 2.) As stated above, Dr. Sugar found P's bruising "highly
concerning for inappropriate force[.]" (*Id.*)

01 regarding plaintiff. (*Id.*, ¶17 and Ex. B at 6-8.) Munoz notified plaintiff by letter as to the
02 decision. (*Id.*, Ex. D.) An internal review, conducted at plaintiff's request, affirmed the
03 founded conclusion, as explained in a letter dated April 3, 2009. (*Id.*, Ex. E.)

04 On June 24, 2009, DEL issued an amended revocation letter. (Dkt. 45, Ex. B.) The
05 letter added the founded child abuse finding by DLR/CPS as a basis for the license revocation.
06 (*Id.* (citing Wash. Admin. Code § 170-296-0450(2)(b) ("We must deny, suspend or revoke your
07 license if you: . . . Have been found to have committed . . . child abuse, child neglect or
08 exploitation[.]"))

09 ALJ Hosannah continued the previously scheduled summary suspension hearing so that
10 it could be heard at the same time as the revocation hearing. (*See* Dkt. 25-1 at 44.) ALJ
11 Hosannah thereafter left OAH and OAH reassigned the matter to ALJ Kingsley. (*Id.*)
12 Believing the August 2008 revocation letter had been properly served on plaintiff, DEL moved
13 to dismiss the matter for plaintiff's failure to respond. (*Id.*) ALJ Kingsley denied the motion
14 and, on July 12, 2009, plaintiff was personally served with both the June 2009 amended
15 revocation letter and the April 2009 letter affirming the founded abuse finding. (*Id.* at 26, 44.)

16 Plaintiff timely appealed both findings and OAH consolidated all three matters – the
17 license suspension, license revocation, and finding of abuse – for hearing. (*Id.* at 1.) OAH
18 reassigned the matters to ALJ Futch after ALJ Kingsley left OAH. (*Id.* at 44.) At an August
19 26, 2009 prehearing conference, ALJ Futch made evidentiary rulings and scheduled the matters
20 for hearing for three days in January 2010. (*Id.* at 1, 44-45.) At hearing, plaintiff chose not to
21 present witnesses, deciding to rely on the record created at the stay hearing. (Dkt. 42, Ex. C
22

01 (transcript of plaintiff's testimony explaining her decision).) After the hearing, in May 2010,
02 the matters were reassigned to ALJ Pesik due to ALJ Futch's unavailability. (Dkt. 25-1 at 45.)

03 ALJ Pesik listened to the recordings of the May 2008 stay hearing and the January 2010
04 hearing conducted by ALJ Futch, and reviewed all relevant materials and exhibits. (Dkt. 17-1
05 at 2-3.) On December 30, 2010, ALJ Pesik issued his initial decisions and orders, upholding
06 the summary suspension, license revocation, and founding finding of abuse. (Dkt. 17-1, Exs.
07 A & B.) With respect to the abuse, ALJ Pesik's findings included that plaintiff told P's parents
08 reporting the bruising would "make a lot of trouble for everyone, themselves included[,]"
09 which the parents understood "to be a threat or intimidation."; that Dr. Sugar concluded the
10 bruises were most likely the result of a forceful diaper change and that, since the bruising had
11 lasted at least two days, the injury was "'significant'" and indicative of inappropriate force; that
12 there was no reason to believe P's parents had caused the bruising and it was "more likely than
13 not" plaintiff caused the bruising since it was not observed by P's mother until the afternoon of
14 April 10th and plaintiff testified to being the only person who changed P's diaper. (Dkt. 17-1
15 at 6.)

16 With regard to the license suspension, ALJ Pesik found that plaintiff's initial response
17 to P's parent's concerns "reflects a troubling lack of regard for the factual issues surrounding"
18 P's injuries "and a clearly greater concern with protecting" plaintiff's "business interests." (*Id.*
19 at 18.) ALJ Pesik added: "This lack of primary concern for the welfare of the child is
20 sufficient to cause concern that the continued operation of the daycare facility would present a
21 threat to the public health, safety and welfare." (*Id.*) With regard to the license revocation,
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01 ALJ Pesik found the witness testimony contrary to plaintiff's testimony "more credible[.]" and
02 noted, *inter alia*, plaintiff's failure to report the injury, her attempt to persuade the parents to not
03 report the injury, the fact that plaintiff backdated the injury report and falsely testified regarding
04 that fact at the May 2008 hearing, while testifying at the January 2010 hearing that she had not
05 reported the bruising because she thought the bruises were old, and plaintiff's past licensing
06 violations. (*Id.* at 19-21.)

07 Plaintiff timely appealed all findings to both the DEL Review Judge and the DSHS
08 Board of Appeals. All three matters were consolidated and heard by Review Judge Marjorie
09 Gray. (*See* Dkt. 24-1 at 1.) Plaintiff, in addition to challenging the findings, alleged violation
10 of her due process rights, biased decision makers, and the use of the incorrect standard of proof.
11 (Dkt. 25-1 at 2-10.) Review Judge Gray issued Review Decisions and Final Orders in the CPS
12 and DEL matters on April 21, 2011 and May 19, 2011 respectively. (Dkts. 24-1 and 25-1.)
13 The decisions upheld ALJ Pesik's findings of fact and conclusions of law, found testimony
14 offered by plaintiff not credible (and in some respects "untruthful and unethical" (Dkt. 25-1 at
15 28, 41)), and found plaintiff's claim of bias and/or lack of fairness not substantiated. (Dkts.
16 24-1 and 25-1.)⁴ The Review Judge deferred the issue of the proper standard of proof for
17 judicial review. (Dkt. 24-1 at 28-30 and Dkt. 25-1 at 31-35.)

18 The final orders advised plaintiff of her right to appeal in Washington State Superior
19 Court. (Dkt. 24-1 at 41 and Dkt. 25-1 at 49.) She did not appeal and, instead, proceeded with
20 the current case, which had been stayed pending resolution of the state proceedings.

21 4 Review Judge Gray did disagree with ALJ Pesik in one respect, finding insufficient evidence to support
22 an allegation that plaintiff attempted to persuade a non-English speaking parent (not Rivera-Flores) to avoid taking
her child to a doctor to avoid a possible CPS referral. (Dkt. 25-1 at 30.)

01 DISCUSSION

02 Summary judgment is appropriate when a “movant shows that there is no genuine
03 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.
04 R. Civ. P. 56(a). The moving party is entitled to judgment as a matter of law when the
05 nonmoving party fails to make a sufficient showing on an essential element of his case with
06 respect to which he has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23
07 (1986). The Court must draw all reasonable inferences in favor of the nonmoving party.
08 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

09 The central issue is “whether the evidence presents a sufficient disagreement to require
10 submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.”
11 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). The moving party bears the
12 initial burden of showing the district court “that there is an absence of evidence to support the
13 nonmoving party’s case.” *Celotex Corp.*, 477 U.S. at 325. The moving party can carry its
14 initial burden by producing affirmative evidence that negates an essential element of the
15 nonmovant’s case, or by establishing that the nonmovant lacks the quantum of evidence needed
16 to satisfy its burden of persuasion at trial. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos.,*
17 *Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). The burden then shifts to the nonmoving party to
18 establish a genuine issue of material fact. *Matsushita Elec. Indus. Co.*, 475 U.S. at 585-87.

19 In supporting a factual position, a party must “cit[e] to particular parts of materials in
20 the record . . .; or show[] that the materials cited do not establish the absence or presence of a
21 genuine dispute, or that an adverse party cannot produce admissible evidence to support the
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01 fact.” Fed. R. Civ. P. 56(c)(1). The nonmoving party “must do more than simply show that
02 there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co.*, 475
03 U.S. at 585. “[T]he requirement is that there be no *genuine* issue of material fact. . . . Only
04 disputes over facts that might affect the outcome of the suit under the governing law will
05 properly preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 247-48 (emphasis
06 in original). “The mere existence of a scintilla of evidence in support of the non-moving
07 party’s position is not sufficient[.]” to defeat summary judgment. *Triton Energy Corp. v.*
08 *Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). Nor can the nonmoving party “defeat
09 summary judgment with allegations in the complaint, or with unsupported conjecture or
10 conclusory statements.” *Hernandez v. Spacelabs Med. Inc.*, 343 F.3d 1107, 1112 (9th Cir.
11 2003).

12 For the reasons discussed below, the Court finds no basis for granting plaintiff’s motion
13 and finds defendants entitled to dismissal of plaintiff’s claims.

14 A. Eleventh Amendment Immunity

15 “The Eleventh Amendment prohibits federal courts from hearing suits brought against
16 an unconsenting state.” *Brooks v. Sulphur Springs Valley Elec. Coop.*, 951 F.2d 1050, 1053
17 (9th Cir. 1991) (cited sources omitted). *See also Blatchford v. Native Village of Noatak*, 501
18 U.S. 775, 779-82 (1991). This jurisdictional bar extends to state agencies and departments,
19 and applies whether legal or equitable relief is sought. *Brooks*, 951 F.2d at 1053 (citing
20 *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984)). It is well established
21 that § 1983 did not abrogate state immunity, and that Washington State has not waived its
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01 Eleventh Amendment immunity from suit. *Manning v. Washington*, 463 F. Supp. 2d 1229,
02 1244 (W.D. Wash. 2006) (citing *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 66, 70-71
03 (1989) (states are not “persons” amenable to suit under § 1983; the limitation extends to
04 “governmental entities that are considered ‘arms of the state’[.]”)) Accordingly, as argued by
05 defendants, plaintiff’s claims against the State of Washington and OAH are barred by the
06 Eleventh Amendment.⁵

07 Plaintiff relies on inapposite case law in arguing the waiver of Eleventh Amendment
08 immunity. As the Ninth Circuit noted in *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d
09 831 (9th Cir. 2004), Eleventh Amendment immunity “limits the reach of federal judicial power
10 to suits ‘commenced or prosecuted *against* one of the United States.’” *Id.* at 844 (quoting U.S.
11 Const. amend. XI) (emphasis added). Therefore, while reaffirming the clear protection of
12 Eleventh Amendment immunity where states are “haled into federal courts *as defendants*[.]”
13 the Ninth Circuit did not find the Eleventh Amendment implicated by a removal to federal court
14 where a State was the *plaintiff* in the suit. *Id.* at 843-46 (a “state that voluntarily brings suit as
15 a plaintiff in state court cannot invoke the Eleventh Amendment when the defendant seeks
16 removal to a federal court of competent jurisdiction.”) The State defendants did not initiate
17 this suit, and there is no support for the conclusion that, through the initiation of state
18 administrative proceedings against plaintiff, the State of Washington and OAH acted to waive

19 5 The Eleventh Amendment also bars actions for damages against state officials acting in their
20 official capacities, while an exception exists for suits against state officials seeking prospective
21 injunctive relief. *Doe v. Lawrence Livermore Nat’l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997) (citing
22 *Will*, 491 U.S. at 70). Because plaintiff seeks damages, there is a strong presumption she intends a
personal capacity suit against the individual defendants. *See generally Romano v. Bible*, 169 F.3d
1182, 1186 (9th Cir. 1999). In any event, defendants here move for dismissal based on the Eleventh
Amendment only in relation to the State of Washington and OAH.

01 their Eleventh Amendment immunity. *Cf. id.* at 848 (“While California’s hope was to avoid
02 the federal forum, it voluntarily appeared in state court to press its claims against the
03 companies, who predictably sought removal to what they perceived to be a more favorable
04 forum for the adjudication of claims involving federal law.”)

05 Plaintiff sets forth an independent claim for relief under federal law, which is barred by
06 the Eleventh Amendment immunity of the State of Washington and OAH. As such, plaintiff’s
07 claims against these defendants must be dismissed and are not further addressed in this Order.

08 B. Res Judicata and Collateral Estoppel

09 Defendants argue plaintiff should be prohibited from relitigating decisions made by
10 OAH and the DSHS Board of Appeals in the underlying state action. They maintain res
11 judicata bars relitigation of both those claims decided below and claims that could have been
12 decided by the State courts, and that collateral estoppel precludes relitigation of certain issues.

13 Plaintiff, in response, argues only that preclusion does not apply to the constitutional
14 issues raised in this case because the OAH, DEL, and DSHS lacked jurisdiction to decide
15 constitutional issues. *See, e.g., Amunrud v. Bd. Of Appeals*, 124 Wn. App. 884, 892, 103 P.3d
16 257 (2004) (“[A]lthough we recognize that Amunrud could not present his constitutional
17 arguments in the administrative hearing, he has been able to appeal the administrative decision
18 to the courts.”) (*See also* Dkt. 24-1 at 29-30 (Review Judge recognized lack of authority to
19 decide constitutional issues).) However, this argument lacks merit.

20 A federal action is governed by preclusion law. *Exxon Mobil Corp. v. Saudi Basic*
21 *Indus. Corp.*, 544 U.S. 280, 293 (2005). Pursuant to the Full Faith and Credit Act, 28 U.S.C. §

1738, a federal court must “‘give the same preclusive effect to a state-court judgment as another court of that State would give.’” *Id.* (quoting *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 523 (1986)). “‘This statute has long been understood to encompass the doctrines of res judicata, or claim preclusion, and collateral estoppel, or issue preclusion.’” *Gupta v. Thai Airways Int’l, LTD*, 487 F.3d 759, 765 (9th Cir. 2007) (quoting *San Remo Hotel, L.P. v. City and County of San Francisco, Cal.*, 545 U.S. 323, 336 (2005)).

With claim preclusion, successive litigation of a claim is foreclosed by a final judgment, whether or not the same issues are raised in the attempted relitigation. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001)). “Issue preclusion, in contrast, bars ‘successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,’ even if the issue recurs in the context of a different claim.” *Id.* (quoting *New Hampshire*, 532 U.S. at 748-49). In precluding relitigation of matters a party has had a full and fair opportunity to litigate, the preclusion doctrines “protect against ‘the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions.’” *Id.* (quoting *Montana v. United States*, 440 U.S. 147, 153-54 (1979)). The Court looks to the rules of the State in considering preclusion. *Gupta*, 487 F.3d at 765 (citing *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984); *Allen v. McCurry*, 449 U.S. 90, 96 (1980)).

It is well settled, as a matter of federal common law, that a state administrative decision can have preclusive effect on a § 1983 claim. *Wehrli v. County of Orange*, 175 F.3d 692, 694

01 (9th Cir. 1999). That is, “[w]hen a state agency acts in a judicial capacity to resolve disputed
02 issues of fact and law properly before it, and when the parties have had an adequate opportunity
03 to litigate those issues, federal courts must give the state agency’s fact-finding and legal
04 determinations the same preclusive effect to which it would be entitled in that state’s courts.”

05 *Olson v. Morris*, 188 F.3d 1083, 1086 (9th Cir. 1999) (cited cases omitted). The Court looks to
06 the adequacy of the state’s administrative forum in making this assessment:

07 The threshold inquiry . . . is whether the state administrative proceeding was
08 conducted with sufficient safeguards to be equated with a state court judgment.
09 This requires careful review of the administrative record to ensure that, at a
10 minimum, it meets the state’s own criteria necessary to require a court of that
11 state to give preclusive effect to the state agency’s decisions . . . Although a
12 federal court should ordinarily give preclusive effect when the state court would
13 do so, there may be occasions where a state court would give preclusive effect to
14 an administrative decision that failed to meet the minimum criteria set down in
15 *Utah Construction*.

16 *Olson*, 188 F.3d at 1086 (quoting *Miller v. County of Santa Cruz*, 39 F.3d 1030, 1033 (9th Cir.
17 1994) (discussing *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966))).

18 It is also clear that, “[i]f an adequate opportunity for review is available, a losing party
19 cannot obstruct the preclusive use of the state administrative decision simply by foregoing her
20 right to appeal.” *Plaine v. McCabe*, 797 F.2d 713, 718 (9th Cir. 1986). Courts have,
21 accordingly, found that a party’s failure to pursue review of constitutional claims in state court
22 did not defeat preclusion. *See, e.g., Olson*, 188 F.3d at 1086-87 (res judicata barred litigation
of constitutional claims that could have been raised in administrative hearing or in state court);
Misischia v. Pirie, 60 F.3d 626, 628-30 (9th Cir. 1995) (where party did not pursue available
state court appeal, state administrative body’s decision “became final and operated with

01 preclusive effect[.]” precluding litigation as to procedural irregularities in administrative
02 process); *Miller*, 39 F.3d at 1032-35 (unreviewed findings of administrative tribunal precluded
03 further litigation of § 1983 claims).

04 Washington courts recognize that decisions of administrative tribunals may be afforded
05 preclusive effect. *Reninger v. Dep’t of Corrections*, 134 Wn.2d 437, 449, 951 P.2d 782
06 (1998). As under federal common law, the administrative agency must act in a judicial
07 capacity, resolving disputed issues of fact properly before the agency and providing the parties
08 an adequate opportunity to litigate. *Id.*; *Stevedoring Services v. Eggert*, 129 Wn.2d 17, 40, 914
09 P.2d 737 (1996); *State v. Dupard*, 93 Wn.2d 268, 274, 609 P.2d 961 (1980). Considerations in
10 applying preclusion in an administrative setting include (1) whether the agency acting within its
11 competence made a factual decision; (2) agency and court procedural differences; and (3)
12 policy considerations. *Reninger*, 134 Wn.2d at 450; *Stevedoring Services*, 129 Wn.2d at 40.
13 Washington law also recognizes that preclusion bars claims that could have been pursued
14 beyond the administrative setting by appealing to Washington State courts. *See Shoemaker v.*
15 *Bremerton*, 109 Wn.2d 504, 509-11, 745 P.2d 858 (1987) (“Other procedural safeguards were
16 provided in the . . . right of Shoemaker to move for reconsideration and to appeal the
17 Commission’s decision to superior court, even though he chose not to pursue the latter remedy
18 in favor of suing in federal district court on a federal claim.”) *See also In re Marriage of*
19 *Dicus*, 110 Wn. App. 347, 355-56, 40 P.3d 1185 (2002) (“[R]es judicata applies, except in
20 special cases, not only to points upon which the court was actually required by the parties to
21 form an opinion and pronounce a judgment, but to every point which properly belonged to the
22

01 subject of the litigation, and which the parties, exercising reasonable diligence, might have
02 brought forward at that time.”) (quoting *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 329,
03 941 P.2d 1108 (1997)).

04 In this case, the administrative bodies were acting within their competence in rendering
05 final decisions as to child abuse and DEL licensing. See RCW § 26.44.100 and § 26.44.125
06 (abuse of children); RCW § 43.215.305 (DEL licensing); and RCW § 34.05.464 (adjudicative
07 proceedings under Administrative Procedure Act). While they lacked the authority to address
08 constitutional issues, plaintiff had the opportunity to present those issues in state court.⁶

09 The Court has not been given access to the full administrative record in this case.
10 However, a review of the records provided, including the final CPS and DEL decisions (Dkts.
11 24-1 and 25-1), supports the conclusion that the state administrative bodies acted in a judicial
12 capacity to resolve disputed issues of fact and law, and provided the parties adequate
13 opportunity to litigate the issues. As recently described by the Washington Supreme Court in
14 relation to administrative proceedings for DEL licensing cases:

15 Adjudicative proceedings . . . exist that afford significant procedural safeguards
16 to a home child care provider. At an administrative hearing, a home child care
17 provider benefits from an unbiased tribunal, notice of the proposed action and
the grounds asserted for it, an opportunity to present reasons why the proposed
action should not be taken, the right to call witnesses, the right to know the

18 ⁶ As argued by defendants, plaintiff relies on inapposite case law in support of her position.
19 For example, in *Amunrud*, 124 Wn. App. at 892, the Washington Court of Appeals merely recognized
20 that, while a party was not able to present his constitutional arguments in an administrative hearing, he
21 was able to pursue an appeal of that decision and pursue those arguments in state court. See also
22 *Grader v. Lynnwood*, 45 Wn. App. 876, 879, 728 P.2d 1057 (1986) (recognizing constitutional issues
could not be addressed in administrative hearing) and *Yakima County Clean Air Auth. v. Glascam
Builders, Inc.*, 85 Wn. 2d 255, 257, 534 P.2d 33 (1975) (administrative tribunal without authority to
determine issue of constitutionality and, therefore, no administrative remedy to exhaust); *Prisk v.
Poulsbo*, 46 Wn. App. 793, 798, 732 P.2d 1013 (1987) (same).

evidence against her, the right to have a decision based only on the evidence presented, the right to counsel, the making of a record of the proceedings, public attendance of the proceedings, and judicial review of the proceedings.

Hardee v. Dep't of Soc. & Health Servs., 172 Wn.2d 1, 11, 256 P.3d 339 (2011).

Plaintiff was here provided with, at a minimum, notice, the right to representation, the right to conduct discovery, the right to present evidence and witnesses, opportunities to cross-examine witnesses, the provision of final decisions rendering findings of fact and conclusions of law, and the right to judicial review. (*See* Dkts. 24-1 and 25-1.) It appears, therefore, that the State provided plaintiff with process sufficient to afford the resulting decisions preclusive effect. *See, e.g., Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 483-85 (1982) (finding process constitutionally sufficient where plaintiff had opportunity to present evidence, witnesses, and his own testimony, had the opportunity to rebut evidence, could have an attorney's assistance and to ask for subpoenas, and could seek judicial review); *Reninger*, 134 Wn.2d at 451 (procedures deemed adequate included representation by counsel who gave opening and closing arguments, examining and cross examining witnesses, discovery, and depositions under oath); *Shoemaker*, 109 Wn.2d at 509-11 (procedures deemed sufficient included adequate notice, calling and cross-examining witnesses, documentary evidence, opening and closing statements, hearing memoranda, final findings of fact and conclusions of law, and the right to pursue judicial review).

As observed by defendants, the absence of formal rules of evidence in the administrative proceedings does not abrogate preclusion. *Shoemaker*, 109 Wn.2d at 511 ("To hold that [the absence of formal rules of evidence] deprives the decision here of preclusive

01 effect would, in effect, be to completely abolish administrative collateral estoppel. In light of
02 the other, sufficient procedural formalities observed, we see no reason to do so.”) Also,
03 plaintiff’s failure to avail herself of her right to appeal to state court, including pursuing
04 constitutional or other claims within such review, *see* RCW § 34.05.570(3)(a) (providing for
05 judicial relief if the agency order “is in violation of constitutional provisions on its face or as
06 applied[.]”), and *Hardee*, 172 Wn.2d at 7 (court review of whether agency order or supporting
07 statute violates constitution is question of law reviewed de novo), does not rob the state
08 administrative decisions of their preclusive effect. *See, e.g., Plaine*, 797 F.2d at 719 n.12;
09 *Shoemaker*, 109 Wn.2d at 509-11.

10 Lastly, policy considerations militate in favor of preclusion, including efficiency and
11 affording respect to the integrity of the administrative process. The Court finds no basis for
12 concluding that preclusion would work an “injustice[.]” *Malland v. Dep’t of Ret. Sys.*, 103
13 Wn.2d 484, 489, 694 P.2d 16 (1985), or in some respect contravene public policy, *cf. Dupard*,
14 93 Wn.2d at 276 (“[p]ractical public policy” required that parole revocation hearing decision
15 could not be basis for collateral estoppel in the prosecution of new criminal charges).

16 In sum, it appears that the state administrative proceedings suffice as a foundation for
17 preclusion. The Court, therefore, addresses whether claims and issues in this dispute are
18 barred by res judicata and collateral estoppel.

19 In Washington, res judicata applies with a common identity of four elements: (1) subject
20 matter; (2) cause of action; (3) persons and parties; and (4) quality of the persons for or against
21 whom the claim is made. *Schoeman v. New York Life Ins. Co.*, 106 Wash. 2d 855, 859, 726

01 P.2d 1 (1986). Here, defendants assert a concurrence of identity in all four elements,
02 including: (1) common subject matter in the question of the propriety of the decision to
03 suspend and revoke plaintiff's daycare license and issue a finding of child abuse; (2) common
04 causes of action in that the same evidence would be presented, the actions arise out of the same
05 "nucleus of facts[,] and reversal of the State decisions would impair or destroy the rights or
06 interests established in the State action, *Rains v. State*, 100 Wash. 2d 660, 665, 674 P.2d 165
07 (1983); and (3) both common persons and parties and quality of persons for or against whom
08 the claim is made given that the State case was brought by the State of Washington, through its
09 agencies DSHS and DEL, against plaintiff, while plaintiff here pursues claims against
10 Washington, its agencies, and its employees, *see id.* at 664-65 (noting that the parties "although
11 somewhat differently named on the complaints, were 'qualitatively' the same[,] and that a suit
12 against State officials was "in effect a suit against the State.") They maintain, therefore, that
13 res judicata precludes plaintiff from attempting to overturn the child abuse finding or seeking to
14 reinstate her daycare license, as well as pursuing claims that could have been decided by
15 Washington State courts, including the proper standard to apply⁷ and constitutional claims that
16 could have been pursued in State court.

17 Defendants also argue preclusion of issues through collateral estoppel. "Under
18 collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment,
19 that decision may preclude relitigation of the issue in a suit on a different cause of action

20 _____
21 7 As observed by defendants, subsequent to the issuance of the DSHS Board of Appeals'
22 decisions, the Washington Supreme Court ruled that the preponderance of the evidence standard – as
applied in this case – is the constitutionally appropriate standard employed in daycare licensing
revocation cases. *Hardee*, 172 Wash. 2d at 6-19.

01 involving a party to the first case.’’ *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th
02 Cir. 2000) (quoting *Dodd v. Hood River County*, 59 F.3d 852, 863 (9th Cir. 1995)). In
03 Washington, the collateral estoppel elements include: (1) identical issues; (2) a final judgment
04 on the merits; (3) the party against whom collateral estoppel is asserted is the same party or in
05 privity with a party to the prior adjudication; and (4) application of the doctrine must not work
06 an injustice on the party against whom it is to be applied. *Shoemaker*, 109 Wn.2d at 507 (cited
07 sources omitted).

08 Defendants aver that plaintiff seeks to relitigate many issues already decided by the
09 administrative bodies below. They argue that, to the extent plaintiff is attempting to relitigate
10 any of the findings of fact in the DEL and DSHS decisions, the issues would be identical.
11 Defendants aver a final judgment on the merits given the resolution of many substantive issues,
12 and note that plaintiff is the same party in both proceedings. Defendants deny collateral
13 estoppel would work an injustice given that plaintiff was afforded access to a full and fair
14 proceeding below. Defendants, in sum, argue plaintiff is precluded from disputing the facts
15 decided by the administrative tribunal below.

16 Plaintiff does not dispute the concurrence of all elements necessary to establish both
17 claim and issue preclusion generally to this matter. The Court finds plaintiff’s failure to
18 oppose defendants’ arguments to be an admission that the arguments have merit. *See* Local
19 Civil Rule 7(b)(2). The Court further finds the elements to be satisfied as explained in the
20 delineation of defendants’ arguments set forth above. Plaintiff is, accordingly, precluded from
21 relitigating claims decided and claims that could have been decided below, and collaterally
22

estopped from disputing facts decided by the DSHS Board of Appeals. However, due to the lack of clarity in plaintiff's assertion of her claims, and to some extent the explanation of the arguments in the briefing, the precise application of preclusion is difficult. Accordingly, the Court assesses below the merits of plaintiff's claims against the individual defendants as set forth in the pending dispositive motions.⁸

C. Absolute Immunity

State officials are entitled to absolute immunity for their performance of quasi-prosecutorial and quasi-judicial functions. *Tamas v. DSHS*, 630 F.3d 833, 841-42 (9th Cir. 2010). Pursuant to Ninth Circuit law, a state official's decision to institute license revocation proceedings is a function entitled to the protection of absolute immunity. *Costanich v. Dep't of Soc. & Health Servs.*, 627 F.3d 1101, 1108-09 (9th Cir. 2010) (Washington DSHS social worker and other officials absolutely immune for institution of license revocation proceedings). *Accord Hannum v. Friedt*, 88 Wn. App. 881, 888-89, 947 P.2d 760 (1997) (absolute prosecutorial immunity applied to investigator and director of Washington State Department of Licensing for initiation of summary suspension of dealer license and for testifying at administrative hearing). Accordingly, as argued by defendants, to the extent any of plaintiff's claims are based on the institution of the summary suspension and licensing revocation proceedings, defendants Thebo and Roalkvam are entitled to absolute

⁸ Plaintiff makes generalized reference to constitutional provisions in her amended complaint, such as the Equal Protection Clause and the Seventh Amendment, without explaining the basis for claims based on those provisions and without addressing any such claims in the summary judgment briefing. Any such claims are wholly conclusory, do not withstand dismissal on summary judgment, and are not otherwise addressed within this Order.

immunity.⁹

D. Qualified Immunity and Plaintiff's Remaining Claims

Plaintiff alleges in her amended complaint that Munoz, Thebo and Roalkvam violated her property interest in her childcare license and her liberty interest in her right to work in her chosen profession as a licensed child care provider, and in relation to her name and reputation. (Dkt. 36 at 8-9.) She also alleges Thebo violated her constitutional right to free speech. (*Id.* at 11.) In moving for partial summary judgment, plaintiff appears to allege a Fourth Amendment violation through Thebo's entry into her daycare without a warrant or probable cause, and Fourteenth Amendment violations through the denial of substantive and procedural due process in the suspension of her child care license. (Dkt. 46.)¹⁰ She also avers her right to additional substantive and procedural safeguards due to the seriousness of the child abuse allegation, and alleges violations of her rights under the Washington Constitution. (*Id.*)

Defendants assert the individually named defendants' entitlement to qualified immunity

⁹ Defendants do not argue the application of absolute immunity to the *investigation* conducted by Thebo. Instead, they argue absolute immunity applies to the decision to *institute* licensing proceedings. All of the case law discussed above supports this distinction. See *Tamas*, 630 F.3d at 841-42 (absolute immunity extends to officials performing quasi-prosecutorial and quasi-judicial functions, but not to investigatory conduct; finding the decision to license an individual as a foster parent and to not remove children from that individual's care to be "traditional investigation and placement responsibilities" not entitled to absolute immunity); *Costanich*, 627 F.3d at 1108-09 (absolute immunity applied to institution of license revocation proceeding, but not to investigation and filing of declaration in support of termination proceedings); *Hannum*, 88 Wn. App. at 889-90 (absolute immunity applied to initiation of summary suspension and license revocation proceedings, but trial court failed to cite proper ground for dismissal in deeming investigatory functions performed by social worker protected by absolute immunity).

¹⁰ As observed by defendants and as demonstrated in the discussion below, while plaintiff also maintains the seizure of her license violated her rights under the Fourth Amendment, this claim is properly considered in relation to the Fourteenth Amendment.

01 based on the absence of any support for the conclusion that their conduct violated a clearly
02 established constitutional right. *Saucier v. Katz*, 533 U.S. 194, 200-02 (2001). As argued by
03 defendants, the Court finds an absence of material factual disputes and defendants' entitlement
04 to a judgment as a matter of law in relation to all of plaintiff's claims against the individual
05 defendants. *See id.* at 201 ("If no constitutional right would have been violated were the
06 allegations established, there is no necessity for further inquiries concerning qualified
07 immunity.")

08 1. Fourth Amendment:

09 The Fourth Amendment provides for "[t]he right of the people to be secure in their
10 persons, homes, papers, and effects, against unreasonable searches and seizures[.]" U.S.
11 Const. amend. IV. The Fourth Amendment is triggered where a search or seizure occurs in an
12 area where an individual has a "constitutionally protected reasonable expectation of privacy."
13 *Friedman v. Boucher*, 580 F.3d 847, 861 (9th Cir. 2009) (internal quotation marks and quoted
14 sources omitted). *Accord New York v. Burger*, 482 U.S. 691, 699-700 (1987); *Katz v. United*
15 *States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). The expectation attaches to
16 administrative inspections pursuant to a regulatory scheme, as well as to commercial premises,
17 albeit in a more attenuated form that that applied to an individual's home. *Burger*, 482 U.S. at
18 699-700.

19 Consent is well-established as a recognized exception to the Fourth Amendment's
20 protection against unreasonable searches and seizures. *United States v. Russell*, 664 F.3d
21 1279, 1281 (9th Cir. 2012) (citing *Katz*, 389 U.S. at 358 n.22 ("A search to which an individual
22

consents meets Fourth Amendment requirements.”)). The government bears the burden of showing consent was given freely and voluntarily. *Id.* (cited source omitted).

Plaintiff alleges a Fourth Amendment violation based on Thebo’s entry into her daycare without probable cause and without a warrant. However, plaintiff does not dispute and the evidence in this matter establishes that plaintiff consented to Thebo’s entry into her home. (Dkt. 44, ¶9 and Dkt. 42-5 at 11, 14-15.) Plaintiff also consented to Thebo’s review of her records and admitted she did not observe Thebo seize anything from her home or notice anything missing after Thebo left. (Dkt. 42-5 at 11.) Given the undisputed fact of plaintiff’s consent, as well as the absence of any allegation Thebo seized plaintiff’s property during her April 2008 visit to plaintiff’s home, plaintiff fails to make a showing on an essential element of her Fourth Amendment claim. Defendants are, accordingly, entitled to dismissal of plaintiff’s Fourth Amendment claim on summary judgment.

2. Procedural Due Process:

The Fourteenth Amendment protects against governmental deprivations of “life, liberty, or property” without due process of law. U.S. Const. amend. XIV. A procedural due process claim has two elements: (1) the deprivation of a constitutionally protected liberty or property interest; and (2) the denial of adequate procedural protection. *Brewster v. Bd. of Educ. of the Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir. 1998).

Plaintiff avers a property interest in her childcare license and a liberty interest in both her right to work in her chosen profession and in relation to her name and reputation. She takes issue with the content of the April 14, 2008 summary suspension notice, referring to an

01 allegation “that a child sustained an unexplained injury while in [her] care and that [she]
02 attempted to convince the parent not to report the injury to the licensor.” (Dkt. 44, Ex. A;
03 *accord id.*, Ex. D.) Plaintiff maintains the notice left her to guess at the factual basis for the
04 allegations and thereby deprived her of adequate notice and the opportunity to make a
05 meaningful response.

06 Defendants concede for the purposes of their motion that plaintiff has a property interest
07 in her childcare license, *see Costanich*, 627 F.3d at 1110 (assuming without deciding that a
08 foster parent had a protected property and/or liberty interest in foster care license), and do not
09 address whether plaintiff has a liberty interest in pursuing her profession or in relation to her
10 name and reputation. The Court concludes that it need not resolve the issue of plaintiff’s
11 property and/or liberty interests. That is, even assuming the existence of such interests, the
12 Court finds an absence of any showing plaintiff was deprived constitutionally adequate process.

13 “The fundamental requirement of due process is the opportunity to be heard ‘at a
14 meaningful time and in a meaningful manner.’” *Mathews v. Eldridge*, 424 U.S. 319, 333
15 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Because the opportunity to
16 be heard requires knowledge a matter is pending, “[a]n elementary and fundamental
17 requirement of due process in any proceeding which is to be accorded finality is notice
18 reasonably calculated, under all the circumstances, to apprise interested parties of the pendency
19 of the action and afford them an opportunity to present their objections.” *Mullane v. Central*
20 *Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

21 In this case, the summary suspension letter informed plaintiff a DLR/CPS investigation
22

01 had been activated based on alleged negligent treatment/maltreatment or physical abuse of a
02 child in plaintiff's care, described the allegations as involving an unexplained injury to a child
03 in plaintiff's care and an attempt to convince the parent to not report the injury, provided the
04 referral number for the investigation, and stated that "emergency" and "immediate" action was
05 found "necessary" and "imperative" pursuant to RCW § 43.215.305(b)(2), given a finding that
06 plaintiff's daycare "constitutes a threat to the public health, safety, and welfare[.]" (Dkt. 44,
07 Exs. A & D (citing and quoting RCW § 43.215.305; also citing WAC 170-296-0450).) The
08 letter also informed plaintiff of the steps she must take to contest and/or stay the suspension,
09 and advised her to contact Thebo if she had any questions regarding the decision. (*Id.* (citing
10 RCW § 43.215.305(4)(b)).)

11 The summary suspension letter sufficiently informed plaintiff as to the pendency of the
12 action and afforded her the opportunity to respond. *See, e.g., Greenwood v. FAA*, 28 F.3d 971,
13 975 (9th Cir. 1994) (due process satisfied where notice and opportunity to discuss suspension of
14 pilot examiner designation was provided promptly after suspension). Indeed, plaintiff did
15 promptly respond, beginning with her timely request for a stay of the suspension, followed
16 shortly thereafter by her participation in the May 2008 hearing. (*See* Dkt. 42, Exs. A & B; *see*
17 *also* Dkt. 25-1 at 24.)

18 Contrary to plaintiff's assertion, the decision in *Gete v. INS*, 121 F.3d 1285, 1289-90
19 (9th Cir. 2007), does not support the insufficiency of the notice. In that case, the Ninth Circuit
20 found form letters issued for INS forfeiture proceedings insufficient where they stated only that
21 property had been seized and provided copies of the relevant act and INS regulations without
22

01 identification of the specific statutory provision alleged to have been violated. Here, unlike in
02 *Gete*, the summary suspension letter did provide a factual explanation for the decision and cited
03 the relevant code provisions. Moreover, other evidence in the record contradicts plaintiff's
04 argument that the summary suspension letter left her guessing as to the factual basis for the
05 allegations against her. For instance, plaintiff demonstrated her apparent knowledge as to the
06 factual basis for the allegations when, on the same date she received the summary suspension
07 letter, she was observed backdating an injury report regarding P to the date of the April 10, 2008
08 incident. (Dkt. 44, ¶10 and Ex. C; Dkt. 25-1 at 24.)

09 Nor does plaintiff set forth any other basis for a procedural due process violation.
10 Plaintiff avers that the "[t]he simple fact that a CPS/DLR investigation is active is not enough to
11 summarily suspend a child care license." (Dkt. 46 at 11.) However, as stated in the
12 suspension letter, Washington law provides for summary suspension of a childcare license
13 "when necessary to protect the public health, safety, or welfare." RCW § 43.215.305(2)(b).
14 In fact, the Washington Court of Appeals recently recognized the authority afforded DEL by
15 RCW 43.215.305(2)(b) to take immediate action in an emergency. *Islam v. Dep't of Early*
16 *Learning*, 157 Wn. App. 600, 615-16, 238 P.3d 74 (2010). The Court noted that "[i]n a
17 situation that requires immediate action, the requirement of 'proof' does not preclude the
18 department from acting upon information that has not yet been tested in a hearing[.]" and
19 upheld the summary suspension of a daycare license where there was an active DLR/CPS
20 investigation and "reliable information" a child was injured. *Id.*

21 Plaintiff cites to RCW § 26.44.010 as only justifying "emergency intervention based
22

01 upon verified information[.]” but that provision addresses parents, custodians, or guardians of
02 children, not childcare providers. Also, the fact that WAC 170-296-0450 requires DEL to
03 deny, suspend, or revoke a license based on a finding of child abuse does not negate the
04 statutory provision allowing for the immediate suspension of a license based on a finding that
05 the suspension is necessary to protect public health, safety, or welfare. The Court additionally
06 notes that, in focusing on the factual explanation as to the existence of a child abuse allegation,
07 plaintiff ignores that the summary suspension letter also pointed to the allegation that plaintiff
08 had “attempted to convince the parent not to report the injury to the licensor.” (Dkt. 44, Exs. A
09 & D.)

10 Finally, plaintiff fails to establish that the absence of a pre-deprivation hearing violated
11 her right to due process. Procedural due process does not in all circumstances require the
12 provision of notice and an opportunity to be heard prior to deprivation of property.
13 *Buckingham v. Sec’y of the USDA*, 603 F.3d 1073, 1082 (9th Cir. 2010) (citing *Parratt v.*
14 *Taylor*, 451 U.S. 527, 540 (1981), *overruled in part on other grounds by Daniels v. Williams*,
15 474 U.S. 327 (1986)). “It can take place through a combination of pre- and post-deprivation
16 procedures . . . or be satisfied with post-deprivation process alone[.]” *Id.* (citing *Cleveland Bd.*
17 *of Educ. v. Loudermill*, 470 U.S. 532, 547-48 (1985) and *Brewster*, 149 F.3d at 984). “It is
18 well-settled that protection of the public interest can justify an immediate seizure of property
19 without a prior hearing.” *Soranno’s Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1317 (9th Cir.
20 1986). Additionally, a due process analysis does not involve “second-guess[ing]” state
21 legislative determinations, and “the relevant inquiry is not whether a suspension should have
22

01 been issued in [a] particular case, but whether the statutory procedure itself is incapable of
02 affording due process.” *Id.*

03 Washington State, in regulating childcare licensing, recognizes the “paramount”
04 interest in “protecting children from the threat of physical and sexual abuse[.]” and that “[t]o
05 safeguard and promote the health, safety, and well-being of children receiving child care and
06 early learning assistance ... is paramount over the right of any person to provide care.”
07 *Hardee*, 172 Wn.2d at 12 (quoting RCW 43.215.005(4)(c)). Further, in addition to providing
08 for the summary suspension of a license when necessary to protect public health, safety, or
09 welfare, RCW § 43.215.305(2)(b), Washington provides for both a procedure for obtaining a
10 stay of a summary suspension and a post-deprivation hearing process. As previously found by
11 this Court, these procedures provided plaintiff “with any due process required by law.” *Brown*
12 *v. Dunbar*, C07-82Z, 2008 U.S. Dist. LEXIS 116278 at *11-13 (W.D. Wash. 2008) (dismissing
13 daycare provider’s § 1983 due process claim).¹¹

14
15 ¹¹ Responding to defendants’ reliance on *Joshua v. Newell*, 871 F.2d 884, 886-87 (9th Cir.
16 1989), for the proposition that Washington law provides an adequate post-deprivation remedy such that
17 a suspension or revocation of a child care license prior to a hearing does not violate due process, plaintiff
18 alleges the inadequacy of the post-deprivation process given her inability to pursue a cause of action for
19 negligent investigation of child abuse because she is not a parent, custodian, guardian, or child, *see*
20 *Ducote v. Dep’t of Soc. & Health Servs.*, 167 Wn.2d 697, 706-07, 222 P.3d 785 (2009). As plaintiff
21 does not set forth a violation of established state procedures governing notification, the case law relevant
22 to these arguments is not directly on point. *See, e.g., Joshua*, 871 F.2d at 886-87 (alleged deprivation
resulted from failure to notify individual of hearing rights, thus implicating *Parratt*’s recognition that
“where an alleged deprivation results from ‘the unauthorized failure of agents of the State to follow
established state procedure,’ and where no predeprivation hearing is practicable, we should examine
whether the state provides an adequate post-deprivation remedy.”) (quoting *Parratt*, 451 U.S. at 543);
Soranno’s Gasco, Inc., 874 F.2d at 1317 (“*Parratt* is limited to situations ‘in which the state
administrative machinery did not and could not have learned of the deprivation until after it had
occurred.”) (quoting *Piatt v. MacDougall*, 773 F.2d 1032, 1036 (9th Cir. 1985)). Moreover, plaintiff
does not set forth a basis for negligent investigation or demonstrate that state law would not otherwise
allow for full compensation of her alleged property loss. *See generally Brown*, 2008 U.S. Dist. LEXIS

01 In sum, plaintiff fails to support a contention that she was denied notice and a
02 meaningful opportunity to respond to the summary suspension. Nor does plaintiff set forth
03 any basis for a procedural due process claim in relation to the ultimate revocation of her license
04 or the founded child abuse finding. *See generally Costanich*, 627 F.3d at 1117 (upholding
05 denial of procedural due process claims where plaintiff “benefited from multiple layers of
06 administrative and state court review and, therefore, cannot allege that she is a victim of ‘lack of
07 process.’”) The Court, therefore, finds defendants entitled to dismissal of plaintiff’s
08 procedural due process claim on summary judgment.¹²

09 3. Substantive Due Process:

10 A substantive due process claim is grounded in an individual’s right to be free from
11 arbitrary action of the government. *Sacramento v. Lewis*, 523 U.S. 833, 845 (1998).
12 However, “only the most egregious official conduct can be said to be “arbitrary in the
13 constitutional sense[.]” *Id.* at 846 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 129
14 (1992)). To amount to a substantive due process violation, the harmful conduct alleged must
15 “‘shock[] the conscience’ or ‘offend the community’s sense of fair play and decency.’”
16 *Rosenbaum v. Washoe County*, 663 F.3d 1071, 1079 (9th Cir. 2011) (quoting *Rochin v.*
17 *California*, 342 U.S. 165, 172-73 (1952)).

18 116278 at *11 (“To satisfy due process, the State remedy need not provide a plaintiff with all the relief
19 available under 42 U.S.C. § 1983 as long as it would fully compensate his or her property loss.”)

20 12 Plaintiff states in a heading in her motion that her due process rights were violated through
21 defendants’ failure to “provide timely information about allegations that [P’s] parents had previously
22 abused their child.” (Dkt. 46 at 8.) Yet, this allegation is no more than conclusory, unaccompanied by
any discussion whatsoever. Also, while plaintiff sets forth “supplemental facts” regarding this
allegation in her reply (*see* Dkt. 54 at 2), she again provides no argument in support. The Court finds no
basis for concluding that plaintiff is entitled to summary judgment in relation to this allegation.

01 Plaintiff, again, appears to base her substantive due process claim in relation to the
02 summary suspension. (See Dkt. 46.) The evidence establishes that defendants summarily
03 suspending plaintiff's license based on an active DLR/CPS investigation, prompted by two
04 referrals (including one from an examining physician), and an allegation that plaintiff had
05 attempted to persuade the child's parents not to make a report regarding the injury in question.
06 (See Dkt. 43, Ex. A and Ex. C at 2.) Plaintiff fails to offer any evidence suggesting defendants'
07 conduct was unreasonable, let alone that such conduct would shock the conscience of a
08 reasonable trier of fact. See, e.g., *Islam*, 157 Wn. App. at 615-16 (upholding summary
09 suspension of daycare license where there was an active DLR/CPS investigation and "reliable
10 information" a child was injured). Cf. *Croft v. Westmoreland County Children & Youth Servs.*,
11 103 F.3d 1123, 1124-27 (3d Cir. 1997) (finding social worker's threat to remove a child from
12 her home unless the father immediately moved out arbitrary where it was based solely on a
13 six-fold hearsay, anonymous, and uncorroborated telephone report and the social worker had no
14 reasonable basis to believe abuse had occurred).

15 Moreover, to the extent plaintiff maintains a substantive due process claim extending
16 beyond the summary suspension, she fails to set forth facts demonstrating conduct that could
17 reasonably be construed as shocking the conscience. Any such allegations are no more than
18 conclusory and insufficient to withstand summary judgment. The Court, accordingly, also
19 finds defendants entitled to dismissal of plaintiff's substantive due process claim.

20 4. First Amendment:

21 Plaintiff alleges Thebo violated her constitutional right to free speech. Defendants
22

01 construe this claim as alleging retaliation through the revocation of plaintiff's license in
02 response to plaintiff telling her other daycare customers about the child abuse allegation and for
03 contesting the summary suspension of her license. While acknowledging plaintiff's first
04 amendment right to free speech and to petition the government for redress of a grievance,
05 defendants aver an absence of any indication in the record that plaintiff's exercise of her First
06 Amendment rights was a substantial or motivating factor in the defendants' decision, as is
07 required to support a First Amendment retaliation claim. *CarePartners LLC v. Lashway*, 545
08 F.3d 867, 876-77 (9th Cir. 2008). Defendants point to the abundance of evidence in the record
09 supporting the license revocation decision, including the detailed reasoning recounted in the
10 August 2008 and June 2009 revocation letters, and the fact that DEL was required to revoke the
11 license following the child abuse finding. (Dkt. 44, Ex. A and Dkt. 45, Ex. B (reasoning
12 recounted *supra* at 5-7); Wash. Admin. Code § 170-296-0450(2)(b) ("We must deny, suspend
13 or revoke your license if you: . . . Have been found to have committed . . . child abuse, child
14 neglect or exploitation[.]"))

15 Plaintiff failed to provide any response to defendants' argument and this failure to reply
16 is taken as a concession that defendants' argument has merit. *See* Local Civil Rule 7(d)(2).
17 The Court further agrees with defendants as to an absence of any evidence in the record
18 supporting a conclusion that plaintiff's exercise of her right to free speech was a substantial or
19 motivating factor in the decision to revoke plaintiff's daycare license. Accordingly,
20 defendants establish their entitlement to dismissal of plaintiff's First Amendment claim on
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22

01 summary judgment.¹³

02 5. Additional Safeguards:

03 Plaintiff maintains her entitlement to additional safeguards of her rights because of the
04 seriousness of the allegation of child abuse. She notes, as a result of the founded child abuse
05 finding, her inability to continue in her chosen profession or complete her education as a
06 nursing assistant because the clinical courses require contact with vulnerable adults. Plaintiff
07 likens the allegation against her to a criminal allegation of child abuse, notes she was denied the
08 rights normally afforded citizens accused of crimes, and posits that, had she been criminally
09 charged with simple assault, she would have faced lesser punishment of only a three year ban
10 on working with vulnerable adults, *see* RCW § 43.43.842(1)(2), or a five year ban on working
11 with children, WAC § 170-06-0120. However, as argued by defendants, plaintiff's arguments
12 lack merit.¹⁴

13 _____
14 13 Plaintiff stated in her amended complaint that, after serving the summary suspension, Thebo
15 "commanded [plaintiff] and her mother not to give their opinions on why the Family Child Care Home
16 license was suspended or why the parents could not bring their children back." (Dkt. 36 at 6.)
17 However, plaintiff did not, either in responding to defendants' motion or in filing her own motion,
clarify that this assertion served as the foundation for her First Amendment claim, or provide any factual
support for her position as required by Rule 56(c). The Court, therefore, declines to find any basis for
denying defendants summary judgment based on the conclusory allegation contained within plaintiff's
amended complaint.

18 14 The Court assumes plaintiff can and does bring this claim against Munez, the lone individual
19 DLR/CPS defendant. The Court also notes that, in addition to the fact that plaintiff's attempt to
20 challenge the standard applied in the administrative proceedings is barred both by the Eleventh
21 Amendment and the preclusive effect of the unappealed state decisions, the case law she relies on does
22 not support her assertion as to a higher standard of review in relation to civil child abuse allegations.
See Hardee, 172 Wn.2d at 12-18 (overruling decision which would compel the requirement of a
quasicriminal standard of proof before revoking a child care license based on children's exposure to
harm where such requirement would be "potentially very harmful" and "not constitutionally
mandated."; distinguishing case calling for application of "clear and convincing" standard of proof to
disciplinary proceedings against physicians, given physicians' "unique education, investment, and

01 The question of whether a penalty is civil or criminal in nature is a matter of statutory
02 construction. *United States v. Ward*, 448 U.S. 242, 248 (1980) (cited sources omitted). The
03 Court looks, first, to whether the legislature intended for a penalty to be civil or criminal, and,
04 second, to whether the penalty is “so punitive either in purpose or effect as to negate that
05 intention.” *Id.* at 248-49 (cited source omitted).

06 This matter involved a founded child abuse finding pursuant to RCW 26.44, a title
07 addressing “Domestic Relations” and intended to make protective services available to children
08 “in an effort to prevent further abuses, and to safeguard the general welfare of such children[.]”
09 RCW § 26.44.010. Abuse of a child under Title 26 includes, *inter alia*, “injury of a child by
10 any person under circumstances which cause harm to the child’s health, welfare, or safety,”
11 RCW § 26.44.020(1), and proscribes as a penalty that founded abuse findings “may be
12 considered in determining” whether (1) a person can be licensed to care for children or
13 vulnerable adults; (2) a person is qualified to be employed by a child care agency or facility; and
14 (3) a person may be authorized or funded by DSHS to provide care or services to children or
15 vulnerable adults, WAC § 388-15-073(3).

16 In contrast, the Washington Criminal Code is intended “[t]o forbid and prevent conduct
17 that inflicts or threatens substantial harm to individual or public interests[.]” RCW §
18 9A.04.020(1)(a). The criminal code includes penalties for crimes against children that entail
19 imprisonment and substantial fines, *see, e.g.*, RCW § 9A.36.140 (assault of a child in the third
20

21 personal attachment” property interest) (discussing *Ongom v. Department of Health*, 159 Wn.2d 132,
148 P.3d 1029 (2006) and *Bang D. Nguyen v. Dep’t of Health*, 144 Wn.2d 516, 29 P.3d 689 (2001)
22 respectively)).

01 degree as defined in RCW § 9A.36.031(f) (with criminal negligence, causing “bodily harm
02 accompanied by substantial pain that extends for a period sufficient to cause considerable
03 suffering”)) and RCW § 9A.20.021(c) (maximum penalty for class C felonies is five years
04 imprisonment and/or \$10,000 fine), and permanent disqualification for a person to be “licensed,
05 contracted, or authorized to have unsupervised access to children or to individuals with
06 developmental disability[.]” WAC § 388-06-0170 (applying to, *inter alia*, child abuse/neglect
07 and “[a] crime against a child”).

08 As argued by defendants, a comparison of the civil and criminal code supports the
09 conclusion that the legislature intended the penalty for an administrative finding of child abuse
10 to be civil in nature. *See, e.g., Ward*, 372 U.S. at 249 (noting that the sanction at issue was
11 labeled as “a ‘civil penalty’” and separated from criminal penalties subsequently set forth).
12 Also, given that a criminal charge in this case would have taken into consideration that the
13 victim was a child, plaintiff misdirects her focus on the crime of simple assault.

14 Neither does plaintiff succeed in supporting the position that the penalty at issue here is
15 so punitive as to negate the intention of a civil penalty. With this inquiry, “‘only the clearest
16 proof could suffice to establish the unconstitutionality of a statute on such a ground.’” *Ward*,
17 372 U.S. at 249 (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)). A variety of factors
18 may be relevant to this analysis, such as:

19 [w]hether the sanction involves an affirmative disability or restraint, whether it
20 has historically been regarded as a punishment, whether it comes into play only
21 on a finding of scienter, whether its operation will promote the traditional aims
22 of punishment – retribution and deterrence, whether the behavior to which it
applies is already a crime, whether an alternative purpose to which it may
rationally be connected is assignable for it, and whether it appears excessive in

01 relation to the alternative purpose assigned[.]

02 *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (footnotes and cited sources
03 omitted).

04 Consideration of a number of the relevant factors demonstrates the absence of the clear
05 proof necessary to support plaintiff's argument. Plaintiff's inability to be licensed or paid in
06 Washington State to care for vulnerable populations does not set forth an affirmative disability
07 or restraint, nor has restriction from working in a particular field been historically regarded as
08 punishment. *Hudson v. United States*, 522 U.S. 93, 104 (1997) ("[N]either money penalties
09 nor [occupational] debarment have historically been viewed as punishment. We have long
10 recognized that 'revocation of a privilege voluntarily granted,' such as a debarment, 'is
11 characteristically free of the punitive criminal element.'"; "While petitioners have been
12 prohibited from further participating in the banking industry, this is 'certainly nothing
13 approaching the "infamous punishment" of imprisonment.'") (quoting *Helvering v. Mitchell*,
14 303 U.S. 391, 399 & n.2 (1938) and *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)
15 respectively).¹⁵ See also *Rivera v. Pugh*, 194 F.3d 1064, 1068-69 (9th Cir. 1999) (revocation
16 of driver's license does not involve affirmative disability or restraint given that the loss of the
17 license is "the loss of a privilege, rather than a punishment."; "It is immaterial that the inability
18 to drive may severely impact some individuals who must drive, for example, to work. . . . The

19 15 Plaintiff cites to case law recognizing the pursuit of an occupation or profession as a liberty
20 interest protected by the due process clause. See, e.g., *Dittman v. California*, 191 F.3d 1020, 1029 (9th
21 Cir. 1999) ("[I]t is well-recognized that the pursuit of an occupation or profession is a protected liberty
22 interest that extends across a broad range of lawful occupations.") (quoted source omitted). However,
in addition to the fact that plaintiff does not support a due process violation, the question of whether an
individual may be entitled to due process in relation to the deprivation of protected interest is a separate
and distinct inquiry from that discussed above.

01 statute is to be evaluated on its face, and ‘whether a sanction constitutes punishment is not
02 determined from the defendant’s perspective.’”) (cited and quoted sources omitted). Also, a
03 founded child abuse finding does not require a finding of scienter. *See* RCW § 26.44.020(1)
04 (defining abuse or neglect and citing RCW § 9A.16.100 (discussing reasonable and moderate
05 force, but not intention)). Finally, neither the mere fact that child abuse is also a crime, nor that
06 the penalty articulated for an administrative finding may also be a deterrent to child abuse
07 renders the sanction criminally punitive. *Hudson*, 522 U.S. at 105.

08 In sum, plaintiff fails to establish her entitlement to additional safeguards of her rights
09 based on the seriousness of the allegation of child abuse. This argument, therefore, provides
10 no basis for plaintiff’s motion for partial summary judgment.

11 6. Washington Constitution:

12 Again asserting that child abuse under RCW § 26.44.020 is a crime, plaintiff avers her
13 right to a jury trial under the Washington Constitution. *See* Wash. Const. art. 1, §§ 21 and 22.
14 However, as stated above, an administrative finding of child abuse under Title 26.44 does not
15 constitute a crime and, therefore, does not entitle plaintiff to a trial by jury. Plaintiff also avers
16 Thebo and Roalkvam violated her state constitutional right to privacy by entering her home and
17 revoking her license without obtaining a warrant based on probable cause. *See* Wash. Const.
18 art. 1, § 7. Yet, as noted by defendants, the provision of the Washington Constitution relied
19 upon by plaintiff in support of this claim does not provide a private right of action. *Reid v.*
20 *Pierce County*, 136 Wn.2d 195, 213-14, 961 P.2d 333 (1998). Plaintiff, accordingly, sets forth
21 no basis for summary judgment in relation to the Washington Constitution.

01 CONCLUSION

02 In sum, the Court finds an absence of a dispute as to any material fact and defendants
03 entitled to a judgment as a matter of law. The Court DENIES plaintiff's motion for partial
04 summary judgment (Dkt. 46) and GRANTS defendants' motion for summary judgment (Dkt.
05 41). This matter is hereby DISMISSED with prejudice.

06 DATED this 26th day of March, 2012.

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09 Mary Alice Theiler
10 United States Magistrate Judge
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